No. 284.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JAMES D. BYRNES ET AL.,
Appellants.

vs.

J. M. DOUGLASS ET AL.,
Appellees.

Petition for Rehearing.

W. E. F. DEAL,
Attorney for Appellants.

EDMUND TAUSZKY,
Of Counsel.

Filed October ____ 1, ____ 1897.

_____ *Clerk.*

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PETITION FOR REHEARING.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellants in the above-entitled proceedings respectfully petition for a rehearing thereof.

Your honors have stated in your opinion [illegible] that upon the facts that appear in the record [illegible] unnecessary to consider whether or not a mining [illegible] which has been [illegible] and is in use by a mining [illegible] under the statute of Nevada, [illegible] from a company by which it is [illegible] and be [illegible] the [illegible] mining [illegible].

The statement of the facts accompanying the opinion is not in accordance with appellants' understanding of the record and we believe a re-examination, upon a rehearing, will show that from the *16th day of June, 1891*, until these proceedings were commenced, this tunnel was constantly used for mining purposes by the appellee J. M. Douglass, while in possession as tenant of the Atlantic Consolidated Mining Company and their grantees, the appellants James D. Byrnes and Edward Muhlbeier. The mistake which has been made as to the facts, has been caused by a misunderstanding of the order of the transactions with reference to the tunnel and the dates of their occurrence from the time when W. H. Stanley took possession of the tunnel, under his lease from the Atlantic Consolidated Company, to the time when these proceedings were commenced.

W. H. Stanley took possession of the mine and tunnel under his lease *March 22d, 1890* (pp. 23 and 24, p. 95). This lease was for the term of two years, from March 22d, 1890, which would make the lease expire *March 22d, 1892*, and the lease gave Stanley the privilege of an extension for the further period of two years; which extension would have expired on *March 22d, 1894*. Stanley's rental was fixed by the lease at 50 cents per ton for every ton of ore extracted and milled from the property, and the lease provided that at the expiration of the lease, Stanley should quit and surrender the premises to the Atlantic Consolidated Company.

The appellant Douglass corresponded with Mr. Greene, who was one of the officers of the company, with refer-

to this tunnel, but nothing came of this (pp. 91 and 92).

After Stanley took possession, under his lease, he ascertained that C. E. Brown had located the Contact claim, in which the mouth and 299 feet of the tunnel were situated (See report of Commissioners, second p., 32. Notice of location of Contact claim, pp. 45 and 46. Testimony of W. H. Stanley, pp. 93 and 94). Stanley purchased the Contact ground so as to avoid all trouble, as he intended to work the mine through this tunnel. It was for the purpose of enjoying the benefit of his lease that he made this purchase.

The deed of the Contact claim was made to W. H. Stanley and C. H. Millievich, on *June 13th, 1891* (pp. 46-48). The date of Brown's location, as shown in this deed, was *July 7, 1890*, after Stanley took possession under his lease, which was on *March 22d, 1890*.

J. D. Blackburn was watchman for the company, having charge of the mine and tunnel from *Oct. 28, 1887*, to *September 1st, 1890* (pp. 101 and 102, 68, 69 and 70).

J. D. Blackburn was interested in the locations of the Contact claim, made by T. P. Mack and C. E. Brown, while Blackburn was in possession, as watchman, of that claim which was owned by the company under the name of the Cadiz claim.

On the *16th day of June, 1891*, W. H. Stanley, who was then in possession of the Atlantic claim, the Contact claim and the tunnel, as tenant of the Atlantic Consolidated Mining Company, assigned his lease and conveyed his interest in the Contact claim to Muhlbeyer, who had been employed by the appellee J. M. Douglass, for that

purpose, the latter having employed Mr. Huffaker as his attorney to draw the papers and having paid the consideration for the assignment and conveyance. There is no conflict in the evidence as to this (See testimony of W. H. Stanley, p. 94; J. M. Douglass, pp. 90 and 91; F. M. Huffaker, p. 74).

At the same time and as part of the same transaction and for the same consideration Muhlbeyer assigned the lease—conveyed the interest in the Contact claim to Douglass (pp. 44 and 45 and 48 and 49). All this was done on *Sept. 16th, 1891.*

Can there by any question that by these transactions J. M. Douglass placed himself in the same position as Stanley, with reference to all this property the Atlantic and Contact claims and this tunnel?

Stanley expressed doubts, at the time of the transactions, as to his right to convey the Contact claim, and only did so upon the assurances of Mr. Douglass' attorney and agent (pp. 94 and 96). When Stanley made the assignment and conveyance to Muhlbeyer he put latter into possession of the same property he held, the Atlantic claim, the Contact claim and the tunnel (p. 97).

Mr. Stanley testified that "after Douglass got the assignment and the conveyance from Muhlbeyer he operated the mine and extracted ore and extended the lower tunnel beyond the point where he penetrated it" (p. 97).

Mr. Douglass denied that he took possession of the tunnel under the lease. If this were so it would make no difference, as he became the tenant of the company and his agents, Muhlbeyer and Charles, took possession by

his direction, and he could not change his relation to the company, except by surrendering the property to it.

Mr. Douglass testified that he and Andrew Charles were working on the Atlantic ground under the lease (p. 77), and that he took the lease for the reason that Charles wanted to work the ground (p. 79), and that Charles measured the work that was done in extending the tunnel (p. 84), and after the appellant James D. Byrnes, failed to get possession of this tunnel, through the refusal of Mr. Douglass' employees to permit him to take possession, he went to see Mr. Douglass about the matter, and Mr. Douglass then produced the lease which had been assigned to him. Mr. Douglass denies having the conversation which Mr. Byrnes testified to, but he does not deny having produced the lease as his justification for refusing to admit Mr. Byrnes into possession.

This tunnel instead of not being used for mining purposes, prior to and up to the time of the commencement of these proceedings, was leased with the mine for the purpose of mining. It was taken possession of by Stanley for the purpose of mining by the use of it with Andrew Charles, who owned one-half of it, of which Mr. Douglass had full notice through his attorney, Mr. Huffaker, and his agent, Muhlbeyer, Stanley's assignee (p. 93). Mr. Douglass, through his agent, Muhlbeyer, was placed in possession of the same property by Stanley, who told Muhlbeyer "he should pay the royalty and conform to the terms of the lease, and he stepped into my shoes so far as that lease was concerned" (p. 97).

Is there any conflict in this testimony, or is there any evidence in the record in conflict with it?

Andrew Charles, who was half owner in the lease with the knowledge of Mr. Douglass and with his co[illegible], continued to work under the lease and acted for Douglass as his agent in measuring the tunnel which Mr. Douglass extended 718.1 feet from its face, which was 648½ feet from its mouth, prior to the 6th day of February, 1893, the date of Mr. Douglass' attempted location, all of which work was done while Mr. Douglass was, under the evidence, the tenant of the owners of the tunnel. Before these proceedings were commenced Mr. Douglass was as much bound to comply with the covenant of the lease to surrender possession of this tunnel, which this Court has decided belonged to the Atlantic mine owned by the appellants Byrnes and Muhlbeyer, as was Mr. Stanley. The tunnel had been repaired and cleaned out by Mr. Douglass a distance of 648½ feet before these proceedings were commenced. There never was any dispute or question about this. After Mr. Douglass repaired and cleaned out the 648½ feet, and before these proceedings were commenced, and on the *6th day of February, 1893*, he attempted to acquire title to the right of way embraced in the 648½ run by the Atlantic Consolidated Mining Company before the making of the lease to Stanley, and the 718.1 feet which Mr. Douglass run after the lease was assigned to him, and before he commenced these proceedings, by making a location of it under Section 2323 of the Revised Statutes of the United States. In his affidavit to his notice of location (p. 27), he swore that he and his predecessors in interest have run the tunnel a distance of 718.1 feet from its *face*, not from its mouth, but from

the point 648½ feet from its mouth. Ore was taken out of this tunnel and deposited for Messrs. Charles and Douglass (p. 118).

Further than this Mr. Douglass set up this location in his amended petition in this proceeding and alleged that he had been engaged in running this tunnel since the 16th day of September, 1891 (pp. 4 and 5). This amended petition was verified Sept. 8, 1893. The effect of the allegation is that from Sept. 16, 1891, to Sept. 8, 1893, he had been engaged in running this tunnel. Appellees admit this allegation in their answer, but deny that it was done without objection by the owners (p. 12).

How can it be said that no use was made of this tunnel for mining purposes when the uncontradicted evidence is that it was run and used by Mr. Douglass himself for mining purposes, as tenant of the owners, up to the time when these proceedings were commenced?

He run it to prospect the Goodman mine, in which he was a stockholder, but he could acquire no title to it without purchasing it from the owners. His legal position was fixed by the lease, which was given for the purpose of working the Atlantic mine for a royalty, to be paid by him to the owners. He could not get title to it from the owners so he got possession, in a secret way, from the tenants of the owners, and became a partner of Andrew Charles in the lease and attempted to hold it adversely to the owners, who were obliged to commence an action in the State Court to recover from him the possession of the tunnel (See Byrnes vs. Douglass, 42 Pac. R., 798), and these proceedings were commenced by him for

the purpose of avoiding the result of that action (pp. 69 and 70). If the decree in this proceeding is allowed to stand the result will be that the owners of the Atlantic mine and tunnel will be deprived of the best means of working their own mine by taking this tunnel from them and devoting it to the exclusive use of another for the purpose of working his own mine. A rehearing will at least satisfy this Court, we think, that the main question of law in the case is brought squarely before this Court by the evidence in the record, in which there is no substantial conflict.

The report of the Commissioners, which is confirmed by the decree of the Circuit Court, awards appellees the exclusive use of the tunnel through the Contact mine, a distance of 299 feet from its mouth (Report second, p. 32).

The Commissioners, by their report, find that J. M. Douglass is the owner of an undivided one-half of the Contact mine and the appellants H. C. Biggs and Maggie Lee McMillan each own an undivided quarter thereof (Report first, p. 32), yet they award no compensation to these co-tenants of J. M. Douglass, who, by the decree, are deprived of any use whatever of the best means of working the Contact mine.

This Court sustained this finding on the ground that the tunnel was of no value. The proof shows that this 299 feet of tunnel was run through solid blasting rock, that it could not have been run at the time of the hearing for less than $7 per foot with the tools and materials for blasting added (p. 124), and that the cost of cleaning out that part of the tunnel and laying the rails was 30 cents per foot (p. 104).

The answer of the owners of the undivided one-half in said part of the tunnel was sworn to show what it would have cost to construct this [illegible] feet. It was sworn by Mr. Douglass what it would have cost him to construct it, which was not less than $2,000. And, under the Constitution of Nevada this property could not have been taken without just compensation to the owners. When property is taken, as this was, from the owners and devoted exclusively to the use of another, compensation must be made.

[illegible] County vs. [illegible], 45 Cal. [illegible]

This Court say that competent evidence was produced before the Commissioners that "it was a benefit rather than a disadvantage to the intervening mines to develop their lodes by the tunnels which were run through them."

Where is the benefit in view of the finding of the Commissioners, approved by the Court, that appellants are entitled to the right of way through these mines, "and to the exclusive use of the same, and if the owners of any of said mines desire to use said tunnel they must either negotiate with said petitioners, or proceed to condemn the same" (27 finding, p. 12)?

It was without the province or jurisdiction of the Commissioners to make any such finding—as it was for them to determine who were the owners of the mines through which the tunnel was to run.

The sole duty of the Commissioners was "to ascertain and assess the compensation to be paid." Sec. 4, Act of 1875.

In case of adverse or conflicting claims to the compensation the Court itself must determine the right thereto (Sec. 8, Ibid).

These proceedings are "*special*" (Sec. 2), and the Statute must be strictly pursued.

Respectfully submitted,

W. E. F. DEAL,
Atty. for Appellants.

We hereby certify that the foregoing petition is in our judgment well founded and that it is not interposed for delay.

W. E. F. DEAL and
EDMUND TAUSZKY,
Of Counsel.

Dated San Francisco, October 14th, 1897.